Abdul Salam bin Mohamed Salleh v Public Prosecutor

COURT OF CRIMINAL APPEAL (SINGAPORE) — CRIMINAL MOTION NO 60 OF 1989
YONG PUNG HOW CJ, CHUA AND KARTHIGESU JJ
8 AUGUST 1991

Criminal Procedure — Questions of law of public interest — Principles to be applied in allowing application — Supreme Court of Judicature Act (Cap 322, 1985 Ed), s 60

Criminal Procedure — Trial record — Clerical mistake — Whether signed copy of record can be corrected by reference to the original manuscript — Whether omission of trial judge to explain entry in record sufficient to vitiate verdict — Criminal Procedure Code (Cap 68, 1985 Ed), ss 249 & 396

Criminal Law — Causing disappearance of evidence — What amounts to 'disappear' — Penal Code (Cap 224, 1985 Ed), ss 201 & 204

The appellant was a police sergeant who was charged with causing evidence to disappear contrary to s 201 of the Penal Code (Cap 224, 1985 Ed) ('the Code'). He was tried before a district court and convicted. He appealed against his conviction. See [1990] 1 MLJ 136. In the course of preparing the record of appeal, it was discovered that the district judge had recorded that the charge had been amended at the end of the prosecution case and the defence was called on this amended charge. The district judge eventually clarified that no amendment was made and the defence had in fact been called on the original charge. The appellant's appeal was dismissed but the appellate court allowed him to refer four questions of law to the Court of Criminal Appeal. See [1990] 3 MLJ 275. The questions were:

(1) whether the signed copy of the record of the trial may be corrected by reference to the original manuscript;
(2) whether the omission of the trial judge to explain his entry of an event that never took place during the trial was sufficient to vitiate his verdict;
(3) whether the trial judge had made up his mind as to the guilt of the appellant before calling the defence and whether the trial judge had misdirected himself as to the burden of proof on the prosecution; and
(4) whether the appellant had caused evidence to disappear.

Held, answering questions 1 and 4 in the affirmative and questions 2 and 3 in the negative:

(1) The reference of questions of law of public interest to the Court of Criminal Appeal under s 60 is not an ordinary appeal provision to argue points of law which are settled or novel points which can be decided by the application or extension of established principles of law or the application of statutory provisions which have been authoritatively construed by higher courts. It is a provision that should be used sparingly lest it be made use of as an appeal provision.

(2) There is no rule of law that required a clerical mistake in typing a court record from a handwritten manuscript to be preserved or which protected it from being corrected. The fact that the trial record had been signed could not prevent the mistake from being corrected once its existence came to light.

(3) Inspite of the two inexplicable references to s 204 of the Code in the appeal record, the whole proceedings were clearly in relation to a charge under s 201 and accordingly, there was no failure of justice.

(4) The appellant did not submit an accused person's statement with the investigation papers, but retained it and kept it in his drawer. This was done to keep it from sight of those to whom it should have been shown, and this was sufficient to bring the action within the meaning and purpose of s 201 of the Code.

Cases referred to

1 *Tan Yin Yen* v *PP* [1973] 2 MLJ 143 (refd)
2 *Sivalingam* v *PP* [1974] 2 MLJ 27 (refd)
3 *Ibrahim bin Haji Karim* v *PP* [1976] 1 MLJ 280 (refd)
4 *Cecil Rajah* v *PP* [1981] 1 MLJ 147 (refd)
5 *Ragunathan* v *Pendakwa Raya* [1982] 1 MLJ 139 (refd)
6 *Nunis* v *PP* [1982] 2 MLJ 114 (refd)
7 *PP* v *Choo Ching Hwa & Anor* [1990] 3 MLJ 229 (refd)
8 *Jeyaretnam* v *Law Society of Singapore* [1988] 3 MLJ 425 (refd)
9 *Loh Kwang Seang* v *PP* [1960] MLJ 271 (refd)
10 *Habee Bur Rahman* v *PP* [1971] 2 MLJ 194 (folld)
11 *R* v *Sussex Justices* [1924] 1 KB 256 (refd)
12 *R* v *Thames Magistrates' Court, ex p Polemis* [1974] 2 All ER 1219 (refd)
13 *Manokaran & Anor* v *PP* [1979] 1 MLJ 262 (refd)
14 *Seah Kok Huah* v *PP* [1989] 2 MLJ 466 (refd)
15 *Chow Dih* v *PP* [1990] 2 MLJ 197 (refd)
16 *Haw Tua Tau* v *PP* [1981] 2 MLJ 49 (refd)
17 *Isaac Paul Ratnam* v *Law Society of Singapore* [1976] 1 MLJ 195 (refd)

Legislation referred to

Criminal Procedure Code (Cap 68, 1985 Ed) ss 249, 396
Penal Code (Cap 224, 1985 Ed) ss 201, 204
Supreme Court of Judicature Act (Cap 322, 1985 Ed) s 60

MPH Rubin (*Sharon Thomas* with him) for the appellant.
Sowaran Singh (Senior State Counsel) for the respondent.

Cur Adv Vult

Yong Pung How CJ (delivering the judgment of the court): In May 1984 the appellant, who was a police sergeant attached to the Tanglin Police Station, was charged in a district court under s 201 of the Penal Code (Cap 224, 1985 Ed) ('the Code') for causing evidence of the commission of an offence by one Razali to disappear by deliberately not submitting with the investigation papers a statement by one Razali which he had recorded, with the intention of screening Razali from legal punishment.

What happened was that in the course of investigating a criminal case against Razali, the appellant took two statements from Razali. In his first statement ('P3'), Razali said that one stick of cannabis found in a cupboard in his house belonged to him; in his second statement ('P4'), which was made only ten minutes later, he said that the cannabis did not belong to him, and he explained that his earlier statement ('P3') and an earlier admission to CNB officers that the cannabis did belong to him were made because of his fear that the CNB officers might assault him. The appellant, believing the second statement, P4, to be correct, submitted it to his superior with the investigation papers but retained the

first statement, P3. The appellant kept P3 at all times in his desk drawer and produced it to the Corrupt Practices Investigation Bureau ('CPIB') as soon as he was asked about it. At the conclusion of the trial in the district court, the appellant was convicted and sentenced to four months' imprisonment.

The appellant appealed to the High Court against his conviction and sentence. [See [1990] 1 MLJ 136.] After the notice of appeal was filed, the grounds of decision of the district judge together with his notes of evidence were made available in the usual way to the appellant. It was found from p 51 of the typewritten copy of the notes of evidence that the district judge had recorded this note after the close of the prosecution's case:

> DPP : Applies under s 163 CPC to amend charge under s 204 Penal Code.
>
> Court : Defence called on *amended* charge (emphasis added).
> Two courses explained to accused in ordinary language.
> Elects to give evidence from the witness box.

The grounds of decision included the following passage by the district judge, in explaining what he did after receiving the evidence and the submissions of counsel and the deputy public prosecutor:

> In the circumstances I called on him to make his defence on an *amended* charge (emphasis added) under s 204 of the Penal Code. He elected to give evidence from the witness box.

After considering the evidence of the appellant, the district judge found as follows:

> The court considered his evidence carefully and was satisfied that he had not raised a reasonable doubt on the prosecution's case. He had given a host of reasons which I rejected. In the circumstances I found him guilty of the *amended* charge (emphasis added) and convicted him accordingly.

There had in fact been no application for any amendment by anyone. In his petition of appeal, the appellant complained that the amendment was false and consequently there had been prejudice and grave miscarriage of justice occasioned to him. The appellant's other principal complaint was that the district judge made a grave error in coming to a positive conclusion as to the appellant's guilt at the end of the prosecution's case.

While the appeal was in train before the High Court, extraneous correspondence ensued between the deputy public prosecutor, the officers of the subordinate courts and the district judge, who had by then become the Registrar of Trade Marks. In his first letter, as he was not then in a position to contradict the typewritten notes of evidence, the district judge was unfortunately led to explain that, at the conclusion of the prosecution's case, he had in mind to amend the charge from one under s 201 to one under s 204 of the Code but had inadvertently failed to amend the charge. At the hearing of the appeal in the High Court, the appellant's counsel therefore contended that a compelling inference should be drawn from that letter that when the district judge was writing his grounds, he was in fact addressing the ingredients of the charge under s 204 and not under s 201 of the Code.

After arguments in the appeal were completed in the High Court and judgment was reserved, further correspondence took place between the officers of the subordinate courts and the district judge. It was then suggested that the district judge should reconsider his explanation since it was thought that his handwritten manuscript notes and the typewritten version of them which had been certified as his notes of evidence did not correspond in respect of the word 'amended'. On checking his manuscript notes, the district judge then realized what had happened. In his second letter, he explained that there was a typographical error in the typewritten notes of evidence in that the word 'original' in the manuscript notes had been misread by the typist as 'amended'. He did not, however, offer any explanation as to the ghost entry 'DPP: Applies under s 163 CPC to amend charge under s 204 Penal Code'. Chan Sek Keong J held that the handwriting in the manuscript notes was legible and the word was in fact 'original' and not 'amended'. He was satisfied therefore that the s 201 charge to which the appellant had claimed trial had never been amended, that the defence was called on that charge, and that after the appellant and his witness gave evidence in connection with that charge, he was convicted on that charge. He described the district judge's failure to explain 'the so-called application by the DPP' as an aberration. All the same, he concluded that such an aberration did not constitute a miscarriage of justice. He, therefore, dismissed the appeal against conviction and sentence.

After the appeal was dismissed, the appellant took out a motion under s 60 of the Supreme Court of Judicature Act (Cap 322, 1985 Ed) ('the SCJA') for an order that eight questions of law of public interest, which had arisen in the course of the appeal, and the determination of which by the judge had affected the event of the appeal, be reserved for the decision of the Court of Criminal Appeal. Four of these questions, as amended by the learned judge, were stated to the Court of Criminal Appeal [see [1990] 3 MLJ 275] and were argued before us.

Before dealing with the four questions, it would not be inappropriate for us to review the application for the reference itself, in view of the manner in which the application was argued and decided in the court below. The relevant provisions of s 60 of the SCJA are as follows:

(1) When an appeal from a decision of a subordinate court in a criminal matter has been determined by the High Court, the Judge may on the application of any party and shall on the application of the Public Prosecutor reserve for the decision of the Court of Criminal Appeal any question of law of public interest which has arisen in the course of the appeal and the determination of which by the Judge has affected the event of the appeal.

...

(5) For the purposes of this section but without prejudice to the generality of its provisions —

(a) any question of law regarding which there is a conflict of judicial authority shall be deemed to be a question of public interest; and

(b) the reservation of a question of law for the consideration of the High Court under the provisions of any written law relating to criminal procedure or the exercise by the High Court of any power of revision under any such written law shall be deemed to be an appeal from a decision of a subordinate court in a criminal matter.

It is clear from the terms of s 60 that the court has discretion whether or not to refer a question to the Court of Criminal Appeal when the application to the court is made by a party other than the public prosecutor, even if the question satisfies all the prescribed conditions. It is equally clear that the reference must be of a question of law of public interest, which has arisen in the course of the appeal, and the determination of which by the judge has affected the event of the appeal. The crucial condition in the present case was whether these were questions of law of public interest. There is a paucity of published authorities in Singapore on s 60, but in applying the section Singapore courts have always had regard to the authorities decided under the corresponding s 66 of the Malaysian Courts of Judicature Act 1964. In delivering an oral judgment on a reference to the Federal Court in *Tan Yin Yen* v *PP*,[1] Suffian Ag CJ said:

> It is to be observed that questions of law which may be referred to us under s 66 should not be questions that are of personal interest only to the accused or the public prosecutor, but should be questions that are of public interest, and it seems to us better if the High Court were to exercise their discretion under s 66 sparingly, so that the references are not used as an indirect way of appealing against matters that under the law have been finally determined by the High Court.

This statement was endorsed in two oral judgments in the High Court, by Hashim Yeop A Sani J in *Sivalingam* v *PP*[2] and by Abdoolcader J in *Ibrahim bin Haji Karim* v *PP*,[3] in both of which applications for questions of law to be referred to the Federal Court for determination were dismissed. (See also *Cecil Rajah* v *PP*.[4])

Section 66 was considered at greater length in *Ragunathan* v *Pendakwa Raya*[5] in which Raja Azlan Shah Ag LP said on pp 141 and 142:

> But it is not sufficient that the question raised is a question of law. It must be a question of law of public interest. What is public interest must surely depend on the facts and circumstances of each case. We think that the proper test for determining whether a question of law raised in the course of the appeal is of public interest would be whether it directly and substantially affects the rights of the parties and if so whether it is an open question in the sense that it is not finally settled by this court or the Privy Council or is not free from difficulty or calls for discussion of alternative views. If the question is settled by the highest court or the general principles in determining the question are well settled and it is a mere question of applying those principles to the facts of the case the question would not be a question of law of public interest.
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> It was urged upon us that in at least two previous cases (see *PP* v *D'Fonseka* [1958] MLJ 102 and *Yap Ee Kong* v *PP* [1981] 1 MLJ 144) the applicants had successfully obtained a reference, and that we should follow those cases and determine the questions referred to us. It was further said that the questions are of general importance upon which further argument and a decision of this court would be to the public advantage (see *Buckle* v *Holmes* [1926] 2 KB 125). A short answer is that the two cases referred above involved misdirections in law and this court had no hesitation to intervene because they called for discussion of alternative views. There are no views about the present case.
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> ...
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> But basically, we must consistently decline to receive and answer questions which, though they may be questions of law, are nevertheless not questions of law of public interest, in the sense as we understand it, that a necessity arises for the determination of the questions having regard to the uncertain or conflicting state of the law on the subject; see s 66(6)(a) Courts of Judicature Act 1964.

In *Nunis* v *PP*,[6] the Federal Court refused an application and Raja Azlan Shah CJ in delivering the judgment of the court said at p 118:

> For leave to be granted, it is necessary that the question posed is a question of law raised in the course of the appeal to the High Court and is of public interest. I have in delivering the judgment of this court in *Ragunathan* v *Pendakwa Raya* [1982] 1 MLJ 139 dealt with the test for determining what amounts to a question meeting the requisite factors for the purposes of s 66 of the Courts of Judicature Act, and I made it clear that if it is a mere question of principles, which in the matter before us only involve the construction of certain words in a statutory provision in their application to the facts of the case, the question would not be a question of law of public interest.

In *PP* v *Choo Ching Hwa & Anor*,[7] the Malaysian Supreme Court dismissed an application by the public prosecutor to refer several questions of law to the Supreme Court. In delivering the judgment of the court, Hashim Yeop A Sani CJ (Malaya) said at p 231:

> It hardly needs to be emphasized that an application for leave under s 66 of the Act the court should adopt an attitude of reluctance and be slow in granting leave. This attitude was clearly indicated in *Tan Yin Yen* v *PP* [1973] 2 MLJ 143 and *Ragunathan* v *Pendakwa Raya* [1982] 1

MLJ 139. The basis for this attitude is to ensure that an application for reference does not become an appeal in disguise which is not the intention of s 66(1) of the Act.

The local belief in the application of s 60 of the SCJA was unsettled when the Privy Council took the opportunity in *Jeyaretnam* v *Law Society of Singapore*[8] to give their views at p 432 on the meaning of the section:

> The conviction of the appellant on the accounts charge depends on a construction of s 199 of the Penal Code first propounded by the Chief Justice sitting as a single judge and later adopted by Judge Foenander and Lai Kew Chai J, which is attacked as bad in law. The convictions on the $2,000 and $200 cheque charges depend on findings of fact by the Chief Justice reversing the primary findings of the trial judge on grounds which are attacked as bad in law. The affirmation by the Chief Justice of the conviction by Judge Khoo of the $400 cheque charge is attacked as bad in law. The appellant has had no opportunity to test any of the questions of law which he claims are involved by appeal to the Court of Criminal Appeal of Singapore or, if necessary, by further appeal to the Board, because the Chief Justice and Lai Kew Chai J refused to reserve any questions of law pursuant to s 60 of the Supreme Court of Judicature Act and, in the absence of such reservation, neither the Court of Criminal Appeal nor the Board had any jurisdiction to entertain any appeal. If it can be shown that there were questions of law of public interest which should have been reserved for decision by the Court of Criminal Appeal and that this would have led to the quashing of the convictions either by the Court of Criminal Appeal or on appeal by the Board, it must surely be appropriate, to quote Lord Simon's words 'that the conviction(s) should not be conclusive against the accused in the course of disciplinary proceedings, the object of which themselves is, after all, to promote justice'.
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> Their Lordships have from the outset entertained no doubt that these convictions do indeed raise serious questions of law and they find it difficult to understand how any serious question of law arising in a criminal case on which a person's conviction of a grave offence may depend can be said not to be 'of public interest' within the meaning of s 60(1) of the Supreme Court of Judicature Act. In the end, therefore, the determination of the appeal turns on the question whether the convictions are vitiated by errors of law.

The Privy Council's views were considered at considerable length by Chan Sek Keong J at the hearing of the motion in the court below. As the views expressed by him in his grounds of decision (see [1990] 3 MLJ 275 at pp 279-280) accord with those of the Court of Criminal Appeal, they are set out in extenso below:

> It is to be noted that the views of the Federal Court of Malaysia on the corresponding section were not considered by the Privy Council, presumably because the relevant decisions were not cited. The test laid down by the Privy Council as to when a question of law is of public interest, ie 'any serious question of law ... on which a person's conviction of a grave offence may depend', is not easy to apply, if only because of its uncertain ambit. What is a *grave* offence as distinguished from any other offence? From the case itself, we can deduce that any offence which carries a sentence of imprisonment is a grave offence, as Jeyaratnam was sentenced to one month's imprisonment on one of the charges. He was also fined on one charge in an amount which disqualified him from being a Member of Parliament. Does potential disqualification from holding a public office make an offence grave? Is the test of gravity related to the standards of morality or conduct of Singapore society or to the individual's own standing in society or both? The gravity of an offence is not necessarily commensurate with the gravity of its consequences to the person who has been convicted of such offence.
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> What is a *serious* question of law as distinguished from any other question of law? The ambit of this requirement is also uncertain as the Privy Council has not given any guidelines, beyond stating that the convictions against Jeyaretnam raised serious questions of law. What were these questions of law?
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> On the accounts charge under s 199 of the Penal Code (ie making a false declaration in relation to the accounts), the question was whether the declaration signed by Jeyaretnam was a declaration within the terms of s 199 of the Penal Code. The Privy Council held that there was no ambiguity about that section, that 'what is required is a declaration which is per se admissible 'as evidence of any fact', that the declaration made by Jeyaretnam, not being a statutory declaration, was not per se admissible of the facts stated therein, although it was receivable in evidence.
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> With respect to the charges on the $2,000 cheque and the $200 cheque, on both of which the Chief Justice reversed the trial judge's decision, the Privy Council held that the trial judge's decision was based on findings of fact and that the Chief Justice in setting out to controvert the findings of fact on the central issue as to the circumstances in which the donor had altered his cheque to make it payable to bearer, had exceeded his proper function as an appellate judge and had thereby committed a *serious error of law* which vitiated his decision.
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> With respect to the charge on the $400 on which Jeyaretnam was convicted by the trial judge, the question of law was whether the drawer was entitled to withdraw his cheque or change the donee whilst the cheque was still in the possession of Jeyaretnam. The Privy Council, after stating that 'this was perhaps the simplest case of all and here it was the trial judge who fell into error probably because the right point was never clearly taken', held that there was an imperfect gift of the cheque, and therefore the donor could withdraw it at any time, and was on the evidence withdrawn because he did not want the proceeds to go to the receiver for the creditors of the Workers' Party.
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> The question of law common to the three cheques was whether the property in them had passed to the Workers' Party at the time the cheques were altered by the donor or dealt with by Jeyaretnam with the consent of the donor. The Privy Council held that the property in the cheques had never vested in the Workers' Party as, until they were presented for payment or negotiated to a third party, each of them was nothing more than a revocable mandate to the drawer's bank to pay the amount shown and a revocable promise to the donee that the amount would be paid. Accordingly, the drawer could change the mandate and the promise at any time before it was acted upon. The reason why the lower courts went wrong on this question of law was that, according to their Lordships, 'It is fair to all

concerned to point out that these important considerations do not appear to have been fully appreciated at any stage in the criminal proceedings or to have been adequately formulated in argument until the matter reached the Board.'

It can thus be seen that of the questions of law considered as serious by the Privy Council, two of them concerned substantive principles of law: (i) the gift cheque as a revocable mandate, which was the 'simplest of all', and (ii) the legal nature of a declaration under s 199 of the Penal Code, which turned on the fine distinction between a declaration that is admissible *as* evidence of the facts stated therein and one that is admissible *in* evidence but not of the facts stated therein. The other two questions of law concerned (iii) the proper role of an appellate court in regard to findings of fact by a trial judge.

The word 'serious' used in relation to ideas and concepts connotes the quality of weightiness, complexity and importance and requiring or deserving careful and thoughtful consideration. Except for point (ii) which was conceptually a subtle and therefore difficult point, the other points were not serious in the above sense as point (i) was held to be simple, and point (iii) is settled law.

In regard to point (iii), it was, of course, open to argument that the Chief Justice's approach was wrong, and, in the event, the Privy Council held that the Chief Justice committed a serious error of law. However, the word 'serious' in this context means no more than that it made the difference between an acquittal and a conviction. But, it should be noted, that this kind of questions of law, by its nature, can only be raised in relation to a particular case. It is of no public interest. It was of personal interest to Jeyaretnam in each case.

In Singapore, the majority of criminal cases are tried in the subordinate courts. The normal recourse available to a convicted person who is dissatisfied with his conviction and/or the sentence is to appeal to the High Court. It is in the public interest that a person who has been wrongly convicted of any offence (and not only a grave offence), whether by the wrong application of the law or the application of the wrong law, should be able to have it corrected on appeal. Such a right is provided under existing law, but it does not go beyond the High Court. The public interest in giving a convicted person the right to have his conviction corrected on appeal has to be balanced against the public interest that there has to be finality in the proceedings, and Parliament has decided as a matter of policy that finality in criminal cases tried in the subordinate courts stops at the High Court. Parliament has set the balance by giving a limited right of appeal in such cases rather than to allow them to go all the way to the Privy Council. However, Parliament has also recognized that there are certain questions of law which should be settled by the Court of Criminal Appeal as it is in the public interest that they should be so settled. It is doubtful that s 60 was designed to refer for decision by the Court of Appeal questions which by their nature cannot affect the outcome of cases other than those from which they arose.

It is on these considerations that the courts in Malaysia and Singapore have recognized the limitations of s 60. It is not an ordinary appeal provision to argue points of law which are settled or novel points which can be decided by the application or extension of established principles of law or the application of statutory provisions which have been authoritatively construed by higher courts. Hence, Suffian Ag CJ's caution that the provision be used sparingly lest it be made us of as an appeal provision.

In the present case, on the application of the appellant, Chan Sek Keong J stated to the Court of Criminal Appeal four questions of law of public interest:

Question 1: whether in law the signed copy of the record of the trial transmitted to the appellant under s 249 of the Criminal Procedure Code (Cap 68, 1985 Ed) may be corrected by reference to the manuscript notes of evidence of the trial judge;

Question 2: whether the omission of the trial judge to explain his entry in relation to an event that never took place during the trial was sufficient by itself or in the context of the whole record to vitiate his verdict in this case;

Question 3: whether the trial judge had made up his mind as to the guilt of the appellant before calling on his defence and whether the trial judge had misdirected himself in convicting the appellant on the basis that it was not for the prosecution to prove its case beyond reasonable doubt; and

Question 4: whether, on the evidence, the appellant had caused P3 to disappear.

Question no 1

On question no 1, whether in law the signed copy of the record of the trial may be corrected by reference to the manuscript notes of evidence of the trial judge, Mr Rubin conceded at the hearing before us that the answer should be in the affirmative, but he submitted that any such correction should be subject to stringent qualifications. He drew our attention to s 249 of the Criminal Procedure Code (Cap 68, 1985 Ed) ('the CPC'), which requires the trial court to transmit to the High Court and to the public prosecutor a signed copy of the record of proceedings and of the grounds of decision, but makes no reference to the trial judge's manuscript notes of evidence. We were also reminded of the principle that a trial court, having delivered the grounds of decision may not supplement them, or amplify them: *Loh Kwang Seang* v *PP*;[9] *Habee Bur Rahman* v *PP*.[10]

In the form in which this question has been posed to us, we have no doubt that Mr Rubin was right in conceding that the answer to question no 1 must be in the affirmative. In the present case, there was no question of the notes being supplemented, or amplified. Although the sequence of events may have been tortuous, what happened in this case was simply that the trial judge's handwriting, which was somewhat the antithesis of copperplate, led to a mistake in transcription and the word 'original' in the note of the court's decision was misread by the trial court's secretary as 'amended', a mistake contributed to undoubtedly by the sentence immediately preceding which referred to an application to amend the charge. It was clear to us on inspecting the

manuscript notes in question, as it was clear to Chan Sek Keong J in the High Court, that the notes showed that the defence was called on the 'original' charge under s 201 and not on an amended charge under s 204. It was in fact a simple clerical error. Provisions such as s 249 merely recognize the fact that handwritten manuscript notes, if they are not otherwise required to be preserved in handwritten form, are normally converted into typewritten copies for easier reading. There is no rule of law which requires a clerical mistake in typing a court record from a handwritten manuscript to be preserved or which protects it from being corrected. The fact that the copy of the trial record has been signed, because the mistake was not detected before signature, cannot prevent the mistake from being corrected once its existence comes to light. The signature on the signed copies which are transmitted to the High Court and to the public prosecutor is to show and authenticate their origin, and no more. This must be so, regardless of whether correction of the mistake would be to the advantage of one side or the other.

Question no 2

In the present case, there were two obviously inconsistent explanations given by the district judge as to how the mysterious entry could have arisen. Mr Rubin submitted that the appellant's complaint went to the root of the administration of justice, because an unsatisfactory explanation gave rise to a suspicion that justice had been rushed and had not been manifestly seen to be done. He referred the court to Lord Hewart's often quoted statement in *R* v *Sussex Justices*[11] at p 259; to *R* v *Thames Magistrates' Court, ex p Polemis*;[12] and *Manokaran & Anor* v *PP*.[13] The deputy public prosecutor conceded that it was clear that the district judge made an error, but he referred the court to s 396 of the CPC and to the recent cases of *Seah Kok Huah* v *PP*[14] and *Chow Dih* v *PP*.[15] Section 396 provides as follows:

> Subject to the provisions hereinbefore contained, no finding, sentence or order passed or made by the court of competent jurisdiction shall be reversed or altered on account of —
>
> (a) any error, omission or irregularity in the complaint, summons warrant, charge, judgment or other proceedings before or during trial or in any inquiry or other proceeding under this Code;
> (b) the want of any sanction required by section 129; or
> (c) the improper admission or rejection of any evidence, unless *the error, omission, improper admission or rejection of evidence, irregularity or want has occasioned a failure of justice.* (Emphasis added.)

In our opinion, the real question is whether, in considering the charge against the accused, the district judge's mind had actually been directed towards a consideration of s 204 instead of s 201, and whether consequently this had 'occasioned a failure of justice'. From an examination of the notes of evidence, we note that apart from its appearance on p 51 of the appeal record, to which we have referred, the erroneous reference to s 204 appeared in only one other place, on p 82. On the other hand, correct references to the charge under s 201 appeared in all other parts of the appeal record. The appellant's counsel at the close of the prosecution's case submitted that no case had been made out under s 201 and in his closing submission dealt only with the charge under s 201. The district judge began his grounds of decision by reciting the whole charge under s 201, immediately following which he recorded:

> He claimed trial to the charge, at the end of the trial he was found guilty and was accordingly convicted. He was sentenced to four months' imprisonment. He now appeals against the conviction and sentence.

It is clear from the district judge's review of the appellant's counsel's submission and his explanation of his own reasons for calling on the appellant to make his defence that he was considering a charge under s 201. Of particular significance was his reference, on pp 81 and 82, to the question of the exh P3 being caused to 'disappear', and his reference, on p 87, to the appellant's counsel's closing submission that there had been no criminal intention to cause exh P3 to 'disappear' to 'screen' Razali. The terms 'disappear' and 'screen' are of course essential ingredients under s 201, but have no part in s 204. In our opinion, a close examination of the appeal record shows, inspite of the two inexplicable references to s 204, that the whole proceedings were clearly in relation to a charge under s 201, and that the district judge and both the appellant's counsel and the deputy public prosecutor were dealing with a charge under s 201, and accordingly that there was no failure of justice.

Question no 3

This question is in two parts. As to the first part, Mr Rubin submitted that, by observing that the appellant had shielded Razali by keeping out P3, the district judge made up his mind as to the guilt of the appellant before calling on his defence, and that this ran counter to the principles laid down by the Privy Council in *Haw Tua Tau* v *PP*[16] which enjoins the judge as decider of fact to keep an open mind. In our opinion, this was a clear misapplication of the principles in *Haw Tua Tau*'s case[16] to what happened in the present case. This authority was in fact cited to the district judge by the appellant's counsel in his submission of 'no case' at the close of the prosecution's case, when he made a detailed submission that the ingredients of the offence under s 201 had not been proved. This led the deputy public prosecutor in reply, as he was bound to do, to submit that all the ingredients had been proved, and in the process also to cite *Haw Tua Tau*'s case.[16] The district judge, having considered the submissions, recorded:

> I was satisfied that a case had been made out against the accused, which, if unrebutted, would warrant his conviction.

As to the second part of question no 3, Mr Rubin referred to Chan Sek Keong J's observation (appeal record p 158) that 'the [district judge] did not proceed on the basis that he preferred the evidence of Razali and of DW2' but 'proceeded on the basis that the appellant, as the investigation officer, had to explain why he did not include P3 in the IP', and contended that this ran counter to the fundamental principle that it is for the prosecution to prove its case beyond reasonable doubt. In our opinion, it is clear from a closer reading of the judgment that the learned judge's observation, taken in the whole context of that part of his judgment, implied nothing of the sort. The learned judge was simply referring in fact to the need for the appellant, once his defence had been called on, to explain in his own defence why he failed to do what an officer in his position would have done in the normal discharge of his official responsibilities. In fact, the district judge considered at some length the appellant's evidence both in his examination-in-chief and during his cross-examination:

> I considered the evidence adduced on behalf of the accused but did not believe him ... He had given so many reasons as to why he did not include exh P3 (appeal record p 87)
>
> ... the court considered his evidence carefully and was satisfied that he had not raised a reasonable doubt on the prosecution's case. He had given a host of reasons which I rejected ... (appeal record p 88)

In our opinion, it is clear that the district judge did not convict the appellant on the basis that it was not for the prosecution to prove its case beyond reasonable doubt, and accordingly had not misdirected himself in convicting the appellant.

Question no 4

Mr Rubin submitted that P3 did not 'disappear', because the appellant kept it in his desk drawer, and P3 was produced to the CPIB officer immediately when the appellant was asked about it. He referred us to the definition of the word by the Privy Council in *Isaac Paul Ratnam* v *Law Society of Singapore*.[17] In that case, the appellant at the time of his arrest, still had in his office two files, and did not disclose them to the police officers who arrested him and searched his office in pursuance of a search warrant. It was argued that he had committed no offence under s 201, because 'disappear' involves removing evidence permanently or for so long that it cannot be used in the legal proceedings to which it was relevant, which was not the case, because the two files were subsequently handed over to the police. The Privy Council explained the meaning of 'disappear' in the context of s 201 in the following passage:

> The argument on the word 'disappear' was based partly on what was alleged to be the ordinary use of that term — namely, 'cease to be visible or traceable' — partly on the Indian case of *Harbans Lal* v *The State* AIR 1967 HP 10. But their Lordships consider that the word 'disappear' in s 201 must be contrasted with the words 'secrete or destroy' in s 204.
>
> *For the purpose of s 201 the degree or length of the secretion of the evidence is immaterial, provided that the evidence in question is for a time caused to escape the vigilance of those who are seeking it as evidence.* (Emphasis added.) This accords with the apparent purpose of the section; and the sense of 'disappear' involved is well within the ordinary meaning of the word. Their Lordships do not think that *Harbans Lal* v *The State* would necessarily be followed in other jurisdictions.

In the present case, the appellant should have submitted P3 with the investigation papers, but retained it and kept it in his drawer. In our opinion, this was done to keep it from the sight of those to whom it should have been shown, and this was sufficient to bring the action within the meaning and purpose of s 201.

Accordingly, we answer questions 1 and 4 in the affirmative, and questions 2 and 3 in the negative.

Order accordingly.

Solicitors: *Amarjit Rubin & Partners.*

Reported by *Mathavan Devadas*

Lee Kam Wah v Associated Asian Securities (Pte) Ltd

HIGH COURT (SINGAPORE) — SUIT NO 27 OF 1985
KARTHIGESU J
21 AUGUST 1991

Agency — Remisier and member firm — Delivery of forged share certificates by remisier's client — Whether remisier liable to member firm — Indemnity given by remisier — Whether effective — Whether remisier had warranted that certificates were genuine

Contract — Warranty — Whether genuineness of scrips had been warranted by plaintiff

Contract — Indemnity — Interpretation of indemnity clauses — Need to take surrounding circumstances and parties' real intention into account

The plaintiff was a remisier with the defendants. At the time this action was commenced, the defendants were members of the Stock Exchange of Singapore but had since been put into liquidation. The plaintiff, on ceasing being a remisier with the defendants, had claimed sums of money. The defendants accepted these but counterclaimed for losses suffered by them through the sale of certain public listed company shares which the plaintiff, as a remisier, had put through for TYK against which TYK had delivered scrips which turned out to be fictitious or forgeries. The basis for the defendants' counterclaim was an agreement signed by the plaintiff setting out the terms and conditions of the plaintiff's services as a remisier with the defendants. Under cl 1(viii) of this agreement, the plaintiff agreed to be 'responsible for all liabilities arising from contracts written by [him]'. Under cl 3(iv), the plaintiff agreed